

No. **11376**

IN THE
**United States Circuit Court
of Appeals**

FOR THE NINTH CIRCUIT

THE HOME INSURANCE COMPANY OF
NEW YORK, a corporation,

Appellant,

vs.

MERYL KIRKEVOLD, doing business as
BARNES-WOODIN FUR DEPARTMENT,

Appellee.

No. 11376

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION

APPELLANT'S PETITION FOR MODIFICATION OF
DECISION AS TO COSTS AND INTEREST

FILED

APR 25 1947

PAUL P. O'BRIEN,
CLERK

CHENEY, HUTCHESON & GAVIN
ELWOOD HUTCHESON

Attorneys for Appellant

426 Miller Building
Yakima, Washington

APPELLANT'S PETITION FOR MODIFICATION OF DECISION AS TO COSTS AND INTEREST

Appellant, although gratefully cognizant of the fact that the decision of this Court is in its favor on the principal issue herein, respectfully petitions for a modification of the decision herein solely with reference to costs and interest.

1. As to costs, we have now filed a supplemental transcript in this court showing that an offer of judgment, in the sum of \$1800.00, together with interest and costs, was served upon counsel for appellee herein on June 1, 1945, in full compliance with Rule 68 of the Federal Rules of Civil Procedure. The trial did not commence until March 7, 1946. (Tr. 40). The same was served much more than ten days before the trial began.

Rule 68 provides in part:

"If the adverse party fails to obtain a judgment more favorable than that offered, he shall not recover costs in the district court from the time of the offer, but shall pay costs from that time."

We therefore submit that, having complied with Rule 68 and the offer not having been accepted, appellant is not liable for any costs in the district court subsequent to June 1, 1945, and appellant is entitled to recover from appellee its costs in said court from that time.

2. As to *interest*, the district court held that appellee

was not entitled to recover interest prior to the date of entry of the judgment, saying:

“Now, on the issue of interest, I was under the impression that interest should be charged either from the date of completion of filing of the proof of loss, or at the time within which to bring the suit, but there were, and will, it seems to me, of necessity, be numerous instances here that could not be determined until today. For that reason, I am not going to allow interest from a date other than the one when this judgment is entered.” (Tr. 334).

The judgment appealed from was entered on May 14, 1946 and provided “together with interest from date hereof until paid.” (Tr. 424).

Appellee did not cross-appeal nor assign error upon this ruling. We therefore submit that upon elementary and well-settled principles appellee is not entitled to recover a more favorable judgment on appeal with reference to interest. Consequently no interest should be recoverable prior to the decision of this Court, or in any event not prior to the said date of entry of judgment in the district court. Interest from the date of the fire, May 9, 1944, should therefore not be allowed.

A further reason therefor is that although the maximum limitation of liability in the sum of \$10,000.00 has at all times seemed to us very clear, we submit that the claim was disputed and unliquidated, and hence under well-settled principles was not subject to interest prior

to judgment, as held in the following and numerous other authorities:

Merchants' Insurance Co. vs. Lilgeomont, (CCA 5)
84 F. (2d) 685, 689;

Stemmer vs. Scottish Union and National Insurance Co.,
33 Ore. 65, 49 Pac. 588, 53 Pac. 498;

Amory vs. Reliance Insurance Co., (Mass.) 94 N. E.
677;

Ferber vs. Wisen, 195 Wash. 603, 82 P. (2d) 139;

Great Northern Railway Co. vs. Washington Electric Co., 197 Wash. 627, 86 P. (2d) 208.

Therefore, without requesting a reargument nor a rehearing of the case as a whole, we respectfully submit that the decision of this Court should now be modified in the two respects hereinabove stated, as to costs in the district court and interest.

Respectfully submitted,
CHENEY, HUTCHESON & GAVIN
ELWOOD HUTCHESON
Attorneys for Appellant

The undersigned, Elwood Hutcheson, hereby certifies that he is one of the attorneys for the appellant herein, that he prepared the foregoing petition, that in his judgment the same is well founded, and that it is not interposed for delay.

ELWOOD HUTCHESON

